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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

RAYMOND NORRIS, *et al.*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the standards for class certification set forth in Rule 23(a) of the Federal Rules of Civil Procedure are satisfied in an employment discrimination suit against a company that has nondiscriminatory centralized employment policies, based solely on the delegation of responsibility for individual employment decisions to lower-level supervisors accused of discriminatory conduct.

2. Whether, for purposes of determining whether plaintiffs have satisfied the commonality requirement of Fed. R. Civ. P. 23(a), the District Court is precluded from evaluating the statistical evidence proffered by plaintiffs' statistics expert.

LIST OF PARTIES

The defendant-petitioner is Metro-North Commuter Railroad Company ("Metro-North").

The following plaintiff-respondents appealed to the Second Circuit the District Court's decision denying their consolidated motion for class certification in *Norris v. Metro-North* and *Robinson v. Metro-North*: Raymond Norris, Marvin Edwards, Eric Jones, Daniel Canada, Charles Robinson, Sharon Mack, James Oliver, Joan Woodbury, James K. Hunt, Darryl F. Simpson, Elaine Ester, Donald Hines, James Jackson, Cynthia King, Anthony Ellis, Prince Tillery, Helen Perez, Lord Taylor, Doretha Richardson and Joseph Kimbro.

Of those who appealed, the individual claims of Marvin Edwards, Eric Jones, Daniel Canada, Charles Robinson, Joan Woodbury, James K. Hunt, Darryl F. Simpson, Elaine Ester, Cynthia King, Anthony Ellis, Prince Tillery, Helen Perez, Lord Taylor and Doretha Richardson were discontinued or dismissed on the merits, following the lower court's determination of the class certification motion. Metro-North therefore contests their right to remain as parties to these proceedings. Seven other plaintiffs — Raymond Norris, Sharon Mack, James Oliver, Donald Hines, James Jackson, Tammy Jones and Joseph Kimbro — settled their individual claims without prejudice to their right to remain in the litigation as Class Plaintiffs. Seven other plaintiffs — Veronica Caridad, Tammy Jones, Earl Vaughn, Teresa Whyte, Dwayne Scott, Glenroy Liburd and Giesele Miguel — did not appeal from the District Court's Order denying plaintiffs' motion for class certification and, therefore, are not parties to this proceeding.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the Unites States, and to enable the Justices of this Court to evaluate possible disqualifications or recusal, counsel of record for the petitioning non-governmental corporation certifies that Metro-North Commuter Railroad Company is a public benefit corporation and a wholly-owned subsidiary of the Metropolitan Transportation Authority. *See* N.Y. Pub. Auth. Law §§ 1260, *et seq.* (McKinney 1999).

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ON PETITION FOR WRIT OF CERTIORARI TO
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PETITION FOR WRIT OF CERTIORARI

Petitioner, Metro-North Commuter Railroad Company ("Petitioner" or "Metro-North"), respectfully petitions this Court to issue a writ of certiorari to review the July 29, 1999 decision of the United States Court of Appeals for the Second Circuit and the Second Circuit's subsequent denial of Metro-North's Petition for Panel Rehearing and Petition for Rehearing *En Banc*, issued on October 6, 1999. The Second Circuit's decision and order of July 29, 1999 reversed the August 8, 1997 decision of the United States District Court for the Southern District of New York, which had denied plaintiffs' motion for class certification under Fed. R. Civ. P. 23(a) in this Title VII employment discrimination case. That part of the Second Circuit's decision that affirmed the District Court's subsequent dismissal of the claim of individual plaintiff Veronica Caridad is not at issue in this Petition.

OPINIONS BELOW

The Second Circuit's decision of July 29, 1999 appears at pages A-1 to A-24 of the Appendix to this Petition and is reported as *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283 (2d Cir. 1999). The decision denying Metro-North's Petition for Panel Rehearing and Petition for Rehearing *En Banc*, dated October 6, 1999, and captioned *Norris v. Metro-North*, appears at pages A-25 to A-26 of the Appendix, and is unpublished. The District Court's decision denying plaintiffs' motion for class certification, dated August 8, 1997, appears at pages A-27 to A-34, and is reported as *Robinson v. Metro-North Commuter Railroad*, 175 F.R.D. 46 (S.D.N.Y. 1997).

JURISDICTION

The date on which the United States Court of Appeals for the Second Circuit issued its decision was July 29, 1999. A timely Petition for Panel Rehearing and Petition for Rehearing *En Banc* was denied by the Second Circuit on October 6, 1999.

This Court has jurisdiction under 28 U.S.C. § 1254(1) (1999).

FEDERAL RULES INVOLVED

The provisions of Fed. R. Civ. P. 23(a) are at issue in this Petition. The pertinent text of this rule appears at pages A-39 to A-42 of the Appendix.

STATEMENT OF THE CASE

1. Factual Background

Metro-North is a public benefit corporation responsible for providing commuter rail transportation between New York City and its northern suburbs, including Connecticut. It employs approximately 5,700 employees in 220 different occupations, spread over 37 departments at numerous locations in New York City and its suburbs to the north. Some 4,700 of these employees ("union employees") are represented by one of

Metro-North's 16 unions, and their terms and conditions of employment are set forth in one of 19 collective bargaining agreements that are implemented in conformity with the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* (1999). Most of the remaining employees ("non-union employees") occupy management positions.

2. Metro-North's Decentralized Procedures For Disciplining Union Employees

Pursuant to procedures set forth in the applicable collective bargaining agreement, a supervisor or manager may bring "charges" against a union employee for misconduct, including violations of Metro-North's policies, procedures and safety rules. There are over 400 supervisors and managers with authority to bring such charges. The charges are investigated by a hearing officer who is responsible for gathering evidence and presenting it at a hearing where the employee is represented by his or her union. A transcript of the hearing is presented to the charging supervisor, who determines what, if any, discipline to impose.

Union employees may appeal the imposition of discipline pursuant to procedures set forth in the applicable collective bargaining agreement and the Railway Labor Act, 45 U.S.C. § 153 Second (1999). Although the procedures and the number of appellate levels differ by agreement, there is in all cases an initial review by an Assistant Director of the Labor Relations Department and a final review by a three-member Special Board of Adjustment, which is chaired by a neutral arbitrator. *See* 45 U.S.C. § 153 Second (1999).

No allegations of discrimination have been made in this lawsuit against any hearing officer, representative of the Labor Relations Department, or member of the Special Board of Adjustment.

3. Metro-North's Decentralized Promotion Process

Decisions concerning the movement of employees into management-level positions, either from other positions at

Metro-North or from outside the company, are made by 125 different managerial and supervisory employees located throughout the company who are known as "hiring representatives." Hiring representatives do not have unfettered discretion. Their hiring decisions are governed by company-wide policies and procedures designed to prevent arbitrary conduct and ensure that the most qualified candidates are considered.

Before any candidates are presented to the hiring representatives, the list of available candidates is narrowed down to three to five candidates pursuant to a process in which: the description of, and qualifications for, the available positions are developed; the positions are posted at Metro-North and other locations; qualified candidates are recruited; applicant resumes are reviewed and screened by representatives of the Personnel Department; and qualified applicants are interviewed. The hiring representative then selects from this list the employee determined to be most qualified.

In making their selections, hiring representatives are expected to apply objective, job-related standards, such as: the candidates' experience, education, training, skills and abilities in relation to the requirements specified in the job posting; the candidates' performance during interviews; and the candidates' prior performance in other Metro-North positions. To ensure that such standards are being followed, a representative of Metro-North's Personnel Department reviews closely with the hiring representative the basis for the hiring or promotion decision and reports to the Assistant Director, Personnel - Employment, and in some cases, the Director of Personnel, any situations where there is a concern about the appropriateness of the selection.

No allegations of discrimination have been made in this lawsuit against any member of the Personnel Department.

4. *Metro-North's Efforts To Combat Discrimination and Ensure Equal Employment Opportunities*

Metro-North makes extensive efforts to combat discrimination in the workplace. In accordance with federal regulations, the Director of the Workforce Diversity Department prepares an annual affirmative action plan, which sets forth numerical targets for minority hiring in management-level positions. In addition, the Workforce Diversity Department distributes anti-discrimination and anti-harassment policies and investigates employee discrimination complaints against supervisors and co-employees. The Department investigates such complaints and issues to the appropriate supervisor or manager written recommendations that propose corrective action against persons found to have engaged in discriminatory or otherwise inappropriate conduct. Among the types of corrective actions that the Department may recommend are: oral or written warnings, suspension, termination, diversity training, an unsatisfactory rating on the equal employment opportunity portion of an employee's performance evaluation (in the case of non-union employees), and an apology to the complainant.

No allegations of discrimination were made in this lawsuit against any member of the Workforce Diversity Department.

5. *Plaintiffs' Complaint*

In October 1994, seven plaintiffs commenced *Robinson v. Metro-North Commuter Railroad,* 94 Civ. 7374, under, *inter alia,* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e), *et seq.* (1999). Federal jurisdiction was based on 28 U.S.C. §§ 1331 and 1343 (1999). Pursuant to subsequent amendments, the Complaint eventually included 16 others.

The *Robinson* Complaint alleged that:

> METRO-NORTH fails to carry out an equal employment opportunity ("EEO") policy to protect Black and/or African-American employees against racial discrimination, including but not limited to

> harassment at the workplace. This failure results in a pattern and practice of overly stringent, unequal application of METRO-NORTH's regulations and rules to Black and/or African-American employees, . . . [and] in underutilization of Blacks and/or African-Americans in all aspects of management.

The Complaint was based primarily on allegations of discriminatory discipline and promotion. With respect to discipline, the Complaint alleged, *inter alia*, that:

> Black and/or African-American employees of defendant METRO-NORTH are routinely punished for alleged behavior that does not merit punishment, are falsely accused upon fabricated allegations, and are often terminated for alleged behavior that does not mandate discharge. White employees are often neither punished, nor falsely accused upon fabricated allegations, nor discharged for comparable behavior. In addition, white employees are punished to a lesser degree for behavior comparable to that of Black and/or African-American employees.

With respect to promotions, the Complaint alleged, *inter alia*, that "[t]he intentional and unlawful conduct encompasses METRO-NORTH's systematic failure to implement stated or required EEO objectives in its personnel and managerial activities."

In October 1995, a second Title VII lawsuit, *Norris v. Metro-North Commuter Railroad,* 95 Civ. 8594, was brought as a means to include an additional five plaintiffs. Federal jurisdiction was based on 28 U.S.C. §§ 1331 and 1343 (1999). That Complaint similarly alleged that:

> The named plaintiffs have been subjected to disciplinary proceedings and the unequal application of punishment because of their race and color, a pattern and practice of employment discrimination. In addition, the named

plaintiffs have been denied promotional opportunities and/or hiring opportunities on account of their race and color.

6. Plaintiffs' Motion for Class Certification

Following discovery limited to class certification issues, plaintiffs in the two lawsuits filed a consolidated motion seeking certification of a class consisting of all present and former African-American union and non-union employees of Metro-North, regardless whether they had been disciplined or denied promotion. In response to the motion, Metro-North submitted numerous affidavits, with supporting documentation, which demonstrated that the challenged decisions concerning discipline and promotions were made on an individualized basis by hundreds of individual supervisors and managers, and, as such, could not properly be the subject of a class action. This conclusion was corroborated by Metro-North's statistical report, and was in no way undermined by the anecdotal or statistical evidence offered by plaintiffs.

7. The Reports of the Parties' Expert Statisticians

Plaintiffs' motion was based largely on an expert statistical report. The report contained "regression" analyses of raw, company-wide data concerning the frequency with which African-American and White employees are disciplined and promoted.

The regression analyses purported to establish a statistically significant relationship between race and discipline, and between race and promotion, by "controlling" for age, tenure, department and union status. The expert performed this statistical test only for the company as a whole, however; she did not endeavor to perform any statistical analyses for particular departments or other subgroups of Metro-North. As a result, she reported for each position and each department the same numerical relationship between race and the rate of discipline, even though the relationship clearly differed from one position or department to another. Plaintiffs' expert concluded that:

> [T]he effect of being black on number of disciplinary charges over the 1990-to-1994 period was positive and highly significant statistically. These results clearly permit us to reject the hypothesis of independence between race and discipline and are, therefore, supportive of plaintiffs' allegation of race discrimination in Metro-North's disciplinary practices over this period.

She reached the same conclusion with respect to promotions.

In response to the report of plaintiffs' expert, and to demonstrate affirmatively that there was no basis for class certification, Metro-North submitted the statistical report of its own expert. Unlike plaintiffs' expert, who evaluated the statistics for purposes of opining whether Metro-North was engaged in company-wide discrimination -- an issue properly left for the determination of the merits -- Metro-North's expert analysis addressed the question whether there was evidence to support the conclusion that an evaluation of the individual claims for relief was indicative of whether there was discrimination on a class-wide basis.

With respect to discipline, Metro-North's expert concluded that there was no evidence that the acts of discrimination alleged by plaintiffs were part of a company-wide pattern and practice, and that plaintiffs' expert's conclusions to the contrary resulted, *inter alia*, from her failure to account for differences in the statistical results by department, position and location. This conclusion was based, in the first instance, on the fact that Metro-North's decision-making processes are decentralized, an observation that he found to be confirmed by the data. For example, Metro-North's expert found that:

- There was a huge disparity in the number of disciplines among various departments;
- There were no recorded disciplines at all in 25 of Metro-North's 37 departments for the five-year period for which the data were available;

- Upon closer analysis and after breaking down the data by position and location, there were in fact no disparities in the discipline rates for African-Americans and Whites in departments employing at least 52% of the employees of the company.

Metro-North's expert report also contained the following findings that disproved the notion that inferences of discrimination could be drawn from statistical disparities between White and African-American discipline rates:

- there was no race-based disparity in the rates with which disciplines were overturned on appeal;
- with respect to disciplines that objectively could be verified for accuracy, there was no race-based disparity when the frequency of discipline for African-Americans and Whites was compared to the frequency with which they committed the underlying infractions.

Metro-North's expert similarly concluded that there was no statistical evidence to sustain a company-wide class action in connection with the promotion claim. His conclusion was based upon the huge variations among positions and departments in the existence and degree of race-based disparities in promotion rates. Furthermore, the expert observed that, if the data were limited to positions from which employees had ever been promoted, there were no statistical discrepancies between the promotion rates for White and African-American employees.

In explaining why his findings differed so radically from plaintiffs' report, Metro-North's expert stated that plaintiffs' expert report suffered from the "fallacy of composition," pursuant to which data that would reveal the absence of a disparity on a departmental or occupational basis become camouflaged when merged together with data on other departments or occupations. (A-7-8) This phenomenon was most graphically demonstrated with data from the Grand Central Terminal ("GCT") Department, which alone comprises more than 5% of the workforce. Even though aggregate figures for the GCT Department showed a disparity between the rates

of discipline for African-American and White employees, this seeming disparity disappeared once the data were broken down by occupation. Of the 50 job titles in GCT, 30 showed no disciplinary violations; of the remaining 20, eight showed a larger average number of disciplines for White employees than for African-Americans, and only seven showed a larger average number of disciplines for African-Americans.

In apparent recognition of the force of Metro-North's expert's presentation, plaintiff's expert eventually prepared a table that included data broken down by position, though not by location. Although the table identified several positions in which African-American employees were disciplined more frequently than White employees, it also confirmed that there were many positions, occupied by a substantial portion of the workforce, in which there was no such statistical disparity.

8. The District Court's Decision

In an opinion and order dated August 8, 1997, the District Court denied p laintiffs' motion for class certification, finding that plaintiffs had failed to satisfy either the commonality or typicality requirements of Fed. R. Civ. P. 23(a). (A-34)

In reaching this conclusion, the District Court focused primarily on the statistical evidence. It found that:

> plaintiffs' statistics, even taken most favorably to plaintiffs, cannot carry their burden here, because they fail to take account of the fact that different Metro-North positions have materially different individual rates of discipline and of promotion associated with them. . . . [W]hen these differences are taken into account, no statistically significant racial disparities, either for discipline or promotion, can be established with respect to the great majority of the positions at Metro-North.

(A-30-31) The court similarly found plaintiffs' anecdotal evidence to be unpersuasive, since it related only to a handful of employees, which "hardly constitute[d] a statistically

significant number of aggrieved persons in a putative class of 1,300 employees." (A-32)

The court also concluded that, "[p]roblems of proof aside, there is a more fundamental problem with plaintiffs' approach to commonality, in that, even while seeking certification of a company-wide class, they concede that defendant's standardized, company-wide policies and procedures relating to discipline and promotion are (and were at all relevant times) non-discriminatory." (A-32) Any alleged discriminatory conduct was thus the result of decisions by individual managers and supervisors pursuant to the authority delegated to them.

9. *Subsequent Proceedings*

After the District Court denied class certification, the claims of all but seven of the twenty-eight individuals who at one point or another asserted claims as named plaintiffs were either discontinued or dismissed on Metro-North's motion for summary judgment. The remaining seven plaintiffs settled their individual claims (many of which had also been dismissed), while preserving their right to proceed as named plaintiffs if the ruling on class certification were reversed.

10. *The Decision by the Court of Appeals for the Second Circuit*

On July 29, 1999, the Second Circuit reversed the District Court's decision with respect to the denial of class certification. The Court concluded that, notwithstanding the decentralized nature of the challenged decision-making process, plaintiffs could sustain class claims of discriminatory impact and discriminatory treatment by virtue of their allegation that Metro-North maintained a policy of "delegation" of subjective decision-making to a decentralized force of supervisors. The Court stated:

> [t]hough proving that the grant of discretionary authority to supervisory employees either results in a pattern and practice of discrimination or affects one class of employees

> more harshly than others is likely to be extremely difficult [citation omitted], the fact that the Class Plaintiffs challenge the subjective components of company-wide employment practices does not bar a finding of commonality under either the disparate treatment or disparate impact model. (A-14)

The Court also held that plaintiffs' expert statistical report provided adequate evidence of class-wide discrimination, for purposes of sustaining the commonality requirement, notwithstanding the criticisms offered by Metro-North's expert. Relying on earlier case law which stated that "statistical dueling" on the merits of discrimination allegations is not relevant at the class certification stage, *Krueger v. New York Tel. Co.*, 163 F.R.D. 433, 440-41 (S.D.N.Y. 1995), the Court held that, by crediting "Metro-North's expert evidence over that of the Class Plaintiffs," the District Court had engaged in an inappropriate weighing of the evidence of the merits of the discrimination allegations. (A-17) The Court stated that, even though Metro-North's expert's "critique of the Class Plaintiffs' evidence may prove fatal at the merits stage, the Class Plaintiffs need not demonstrate at this stage that they will prevail on the merits."

In so ruling, the Court made no mention of the fact that the report of Metro-North's expert was not designed to disprove the merits of plaintiffs' claims, as had been the case in *Krueger*, but rather, to demonstrate that, in light of the decentralized nature of the decision-making process, the adjudication of the merits of these individualized claims would not indicate whether there was a class of aggrieved plaintiffs.

In dissent, Judge Walker criticized the panel's conclusion that "Metro-North's practice of delegating personnel decisions - - plaintiffs prefer to call it 'overdelegation' - - constitutes a policy or practice sufficient to satisfy the commonality requirement of Rule 23(a)." (A-23) He observed that "discrimination plaintiffs must identify a common policy or practice, to which they were all subjected, that resulted in

discrimination" because "'Title VII prohibits discriminatory employment practices, not an abstract policy of discrimination.'" ((A-22-23) quoting *General Telephone Co. v. Falcon,* 457 U.S. 147, 159 n.15 (1982)).

REASONS FOR GRANTING THE WRIT

If left undisturbed, the Second Circuit's decision on the two questions presented will have a profound effect on the future conduct of class action litigation, both in the employment discrimination context and elsewhere. The ruling would compel the certification of a company-wide class action wherever: (i) plaintiffs allege that an employer engages in the "quite normal management practice" (A-24, Walker, J., dissenting), of allowing its supervisors and managers to exercise discretion in making employment decisions; and (ii) raw employment data suggest that the total number of adverse employment consequences suffered by minority employees is disproportionate to their numbers in the workforce. This would constitute an unprecedented expansion of the scope of class action litigation, perverting this Court's admonition that the class action device was designed as an *exception* rather than the rule in litigation. *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979).

The Second Circuit majority reached its disturbing result by virtue of its determination that, even though Metro-North's centralized employment policies are admittedly non-discriminatory (and are designed to combat discrimination), the mere delegation of personnel authority to individual supervisors who allegedly violate these policies constituted a "practice" or "policy" sufficient to sustain a class action, under both a disparate impact and disparate treatment theory. In so ruling, the Second Circuit has deepened an existing split among the circuit courts regarding the application of Rule 23(a)'s commonality requirement to employment discrimination claims that challenge decentralized decision-making processes. Whereas other circuit courts have either refused outright to certify classes for such claims or have conditioned class certification on a showing that the decision-making process was completely subjective, the Second Circuit has now determined that decentralized decision-making can satisfy the commonality standard even if it is subject to centralized, objective standards.

The Second Circuit ruling also opens a rift among the circuit courts insofar as it instructs that, for purposes of evaluating whether the commonality standard is satisfied, district courts must accept at face value the plaintiffs' statistical evidence and thus must disregard criticisms offered by defendants' experts. Other circuit courts have construed the Supreme Court's earlier ruling in *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982), which instructed the district courts to engage in a "rigorous analysis" of the Rule 23 requirements, to permit close scrutiny of the expert reports and other evidence relevant to the Rule 23 determination.

The Supreme Court should resolve these issues as a means to restore uniformity in the construction and interpretation of Fed. R. Civ. P. 23(a), in the employment discrimination context and elsewhere.

I.

THE SECOND CIRCUIT'S HOLDING THAT THE DELEGATION OF EMPLOYMENT DECISIONS TO LOWER-LEVEL SUPERVISORS SATISFIES RULE 23(a)'S COMMONALITY STANDARD CONFLICTS WITH RULINGS OF OTHER CIRCUIT COURTS.

As Judge Walker observed in his dissenting opinion, the majority's decision is premised on the finding that "Metro-North's practice of delegating personnel decisions — plaintiffs prefer to call it 'overdelegation' — constitutes a policy or practice sufficient to satisfy the commonality requirement of Rule 23(a)." (A-23) By endorsing this theory, the majority enabled the plaintiffs to side-step a defect that, consistent with prior authorities in the Second and other circuits, the District Court had found to be fatal to a class claim: plaintiffs' failure to attribute the alleged discriminatory conduct of some or all of the hundreds of supervisors responsible for individual discipline and promotion decisions to a centralized discriminatory practice or policy.

The evidence demonstrated—and the class plaintiffs did not dispute—that the departments responsible for overseeing

discipline and promotion decisions were not engaged in any discriminatory practices, and that, to the contrary, their policies and practices were designed to combat discrimination and promote equal employment through the development of objective decision-making standards. If, notwithstanding this evidence, the delegation of decision-making responsibility to lower-level supervisors supports class claims of disparate impact and disparate treatment, the door to class action litigation will now have sprung wide open to include numerous claims that previously were not found to warrant class action treatment. Other circuit courts have expressly prohibited such an expansive application of Rule 23(a).

A. The Second Circuit's Disparate Treatment Analysis Conflicts With the Analysis of the Fourth and Fifth Circuits.

Prior to the Second Circuit's decision, there was a divergence of opinion among the circuit courts as to whether, and under what circumstances, decentralized decision-making can give rise to class claims of disparate treatment. No circuit court had certified a class, however, where the record established that the challenged decision-making was both decentralized and subject to numerous objective standards and controls.

Several authorities—including the Fourth Circuit—had denied motions for class certification of disparate treatment claims upon finding that the alleged discriminatory practices were decentralized in nature and that there was no evidence demonstrating that these practices resulted directly from the employer's centralized policies for regulating employment decisions. *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 279 (4th Cir. 1980); *see also Betts v. Sundstrand Corp.*, 97-C-50188, 1999 U.S. Dist. LEXIS 9743, at *22 (N.D. Ill. June 21, 1999) (unpublished decision); *Appleton v. Deloitte & Touche LLP*, 168 F.R.D. 221, 231-32 (M.D. Tenn. 1996); *Brooks v. Circuit City Stores, Inc.*, 71 Fair Empl. Prac. Cas.

(BNA) 102, 105 (D. Md. 1996); *Duffy v. C. Itoh & Co.*, 53 Fair Empl. Prac. Cas. (BNA) 815, 816 (S.D.N.Y. 1990); *De La Fuente v. Chicago Tribune Co.*, No. 84 C 4596, 1985 U.S. Dist. LEXIS 17512, at *23 n.5 (N.D. Ill. July 24, 1985) (unpublished decision); *Williams v. New Orleans Pub. Serv., Inc.*, 30 Fair Empl. Prac. Cas. (BNA) 1127, 1131 (E.D. La. 1982); *Harrison v. Simon*, 91 F.R.D. 423, 429-30 (E.D. Pa. 1981); *Roberts v. Marine Midland Bank*, 22 Fair Empl. Prac. Cas. (BNA) 326, 329 (S.D.N.Y. 1979); *Wells v. General Elec. Co.*, 78 F.R.D. 433, 438-39 (E.D. Pa. 1978).

The Fifth Circuit had held that a discrimination claim can be certified as a class action notwithstanding the fact that the challenged decision-making is decentralized, but only when the decision-making process is found to be "entirely subjective." *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir.), *cert. denied*, 510 U.S. 991 (1993). In so ruling, the Court relied on the statement in *General Telephone Co. v. Falcon*, that "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." 457 U.S. 147, 159 n.15 (1982). *See Betts v. Sundstrand Corp.*, 1999 U.S. Dist. LEXIS 9743, at *21 ("where there are objective factors, even a generally subjective process will not satisfy Rule 23's commonality and typicality requirements"). *But see Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561, 563 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983) (certifying class claims where a staff of white supervisors made promotional decisions based *primarily* on subjective criteria).

Although the Second Circuit purported to adhere to *Shipes*, there was abundant evidence in the record demonstrating that the challenged decision-making at Metro-North was *not* "entirely subjective." (A-14) To the contrary, supervisors and managers were guided in the exercise of their discretion by objective considerations, and their decisions were subject to several layers of review. (A-4-5). By concluding that Rule

23(a)'s commonality standard was nevertheless satisfied, the Second Circuit's decision effectively removed all pre-existing restraints on the availability of class actions challenging decentralized decision-making.[1]

By virtue of the Second Circuit's ruling, there is now a clear division among the circuit courts on whether and under what circumstances disparate treatment claims that challenge decentralized decision-making may be certified as class actions. Given the significance of the issue, this Court should grant the petition for certiorari and make a definitive ruling on the availability of class certification under these circumstances.

B. The Second Circuit's Finding that Delegation of Decision-Making Responsibility Supports a Class Action Disparate Impact Claim Conflicts With Rulings of the Fourth and Fifth Circuits.

The Second Circuit's decision also broke ranks with authorities elsewhere insofar as it allowed plaintiffs to proceed with a class action, disparate impact claim notwithstanding the decentralized nature of the decision-making that was alleged to be discriminatory. The Court arrived at this result by effectively construing prior Supreme Court authorities on disparate impact claims far more expansively than have other circuit courts.

Although, as the Second Circuit observed, this Court held in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988), that subjective decision-making can give rise to a

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[1] Although no other circuit court decisions have gone this far, a number of district court decisions have certified class claims of employment discrimination notwithstanding the decentralized nature of the challenged employment decisions. *See Wagner v. NutraSweet Co.*, 170 F.R.D. 448, 451 (N.D. Ill. 1997); *Morgan v. United Parcel Serv. of Am., Inc.*, 169 F.R.D. 349, 356 (E.D. Mo. 1996).

disparate impact claim, the availability of such claims was expressly conditioned on a showing of "the specific employment practices that are allegedly responsible for any observed statistical disparities." Accordingly, prior to the Second Circuit's ruling, most courts, including the Fourth and Fifth Circuit Courts of Appeal, had held that a disparate impact claim (whether or not framed as a class action) could not proceed against a company with decentralized employment decisions absent a showing that these decisions were traceable to a concrete practice or policy that applied to all class members, such as a specific selection criterion. *See Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1284 (5th Cir. 1994), *cert. denied*, 513 U.S. 1149 (1995); *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 274 n.10 (4th Cir. 1980); *Boykin v. Viacom, Inc.*, 75 Fair Empl. Prac. Cas. (BNA) 1047, 1050-51 (S.D.N.Y. 1997); *Appleton v. Deloitte & Touche LLP*, 168 F.R.D. 221, 231-32 (M.D. Tenn. 1996); *McCree v. Sam's Club*, 159 F.R.D. 572, 577 (M.D. Ala. 1995); *Stambaugh v. Kansas Dep't of Corrections*, 151 F.R.D. 664, 675-76 (D. Kan. 1993).

For example, in *Anderson*, the plaintiffs sought to have their discriminatory hiring and promotion claims adjudicated under a disparate impact theory, and appealed to the Fifth Circuit the district court's decision to review the case under the disparate treatment theory. Upholding the district court's decision, the Fifth Circuit observed that the plaintiffs had not identified a *specific aspect* of the employer's subjective decision-making that could be shown to have any causal connection to the alleged class-based imbalance in the employer's general or supervisory work force. *Anderson*, 26 F.3d at 1284. Rather, "the plaintiffs merely launched a wide-ranging attack on the cumulative effects of [the employer's] employment practices." *Id. See also Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1370 (2d Cir. 1989) (holding that district court properly determined not to instruct jury on availability of disparate impact claim, and questioning whether plaintiffs "adequately identified at trial 'the

specific employment practice that is challenged'") (citation omitted), *cert. denied*, 494 U.S. 1026 (1990).

In *Stastny*, plaintiffs sought class certification of both disparate treatment and disparate impact claims of discrimination in promotion and related decisions based on allegations that the decision-makers employed excessively subjective criteria. Overturning the district court's order, the Fourth Circuit concluded that, in light of the dispersion of the putative class over multiple facilities with independent decision-making, and the dearth of evidence of an "objectively imposed practice having discriminatory disparate impact," *Stastny*, 628 F.2d at 274 n.10, there was no basis for class certification. *See also Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 238 (W.D. Tex. 1999) ("The fact that promotion decisions are handled by one's immediate supervisor based on subjective criteria would be useful evidence in an individual disparate treatment claim, but works against class certification of a disparate impact claim when the proposed class is subject to the same local autonomy in geographically dispersed facilities").

In contrast to the approach taken by the Fourth and Fifth Circuits, the Second Circuit has now enabled plaintiffs to proceed with class claims under a disparate impact theory without linking the admittedly decentralized decision-making process that is the subject of the lawsuit to a concrete, centralized policy or practice. Insofar as the Court has ascribed to Metro-North a policy of overdelegation as a means of satisfying this requirement, it has extended the reach of *Watson* where no court has previously applied it. As Judge Walker observed in dissent, "overdelegation" is not a policy at all, but rather the absence of policy. (A-23)

Given that disparate impact claims are already unique in that no showing of intentional discrimination is required, the vitiation of the requirement of showing a concrete, centralized policy could lead to a tremendous increase in resort to such claims. Before such an unwarranted expansion in the scope of disparate impact litigation is unleashed, this Court should grant

certiorari and clarify its original intentions with respect to such claims.

II.

THE SECOND CIRCUIT'S HOLDING THAT THE DISTRICT COURT COULD NOT EVALUATE THE STATISTICAL EVIDENCE IS AT ODDS WITH DECISIONS OF THE FOURTH AND EIGHTH CIRCUITS.

Although the Second Circuit conceded that class certification would not be warranted absent a showing that the challenged employment practices have a class-wide impact, it removed from the District Court the power to evaluate whether plaintiffs had made that showing. The Second Circuit invalidated the District Court's determination that the statistical evidence offered by plaintiffs was "meaningless" because, the majority found, that conclusion was attributable to the "sort of 'statistical dueling' [that] is not relevant to the certification determination." (A-15, 31) By virtue of the Second Circuit's ruling, district courts would now be obliged to accept at face value the statistical arguments advanced by the plaintiffs in support of a class certification motion, regardless how unpersuasive these arguments would be found if analyzed more closely.

In rejecting the lower court's evaluation of the statistical reports, the Second Circuit purported to rely on *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), for the proposition that, in adjudicating a motion for class certification, the district court should not be resolving the merits of the claims of the putative class. In so ruling, it overlooked this Court's subsequent ruling in *General Telephone Co. v. Falcon*, which recognized that "'the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,'" and instructed the district courts to engage in a "rigorous analysis" to determine if the criteria for class certification have been satisfied. 457 U.S. 147, 160-61 (1982) (citation omitted). *See*

Nelson v. United States Steel Corp., 709 F.2d 675, 679 (11th Cir. 1983) ("evidence relevant to the commonality requirement is often intertwined with the merits"); *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 276 n.12 (4th Cir. 1980) ("*Eisen* cannot of course be read to forbid any pre-trial inquiry designed to establish the class action criteria that happens to touch on matters that may also relate to the merits of the class or individual claims as alleged"); *Sperling v. Donovan*, 104 F.R.D. 4, 8 n.4 (D.D.C. 1984) ("[c]ourts are aware of the need at the pretrial certification stage to make a determination which, to be fair, must be based to some degree on the merits of the cause of action"); *Hopewell v. University of Pittsburgh*, 79 F.R.D. 689, 694 n.2 (W.D. Pa. 1978) ("[i]t is only proper that statistics be given the same rigorous analysis in a Rule 23 determination as would be given on the merits"); Geoffrey Hazard, *The Form of Action Under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628, 640 (1988) ("in civil rights suits preliminary evaluation of the merits is recognized as an appropriate part, indeed an integral part, of the certification decision").

Since *Falcon*, courts have routinely denied class certification motions where the statistical evidence offered in support of the motion could not withstand this "rigorous analysis." *See Gonzalez v. Brady*, 136 F.R.D. 329, 332-33 (D.D.C. 1991); *Danielson v. Fletcher*, 132 F.R.D. 489, 491-92 (N.D. Ohio 1990); *Ross v. Nikko Secs. Co.*, 133 F.R.D. 96, 97 (S.D.N.Y. 1990); *Price v. Cannon Mills*, 113 F.R.D. 66, 70 (M.D.N.C. 1986); *Harris v. Marsh*, 100 F.R.D. 315, 322-23 (E.D.N.C. 1983); *Ray v. Phelps Dodge Brass Co.*, 35 Fair Empl. Prac. Cas. (BNA) 1004, 1006-07 (N.D. Ala. 1983).

For example, in *Chaffin v. Rheem Manufacturing Co.*, 904 F.2d 1269 (8th Cir. 1990), the plaintiff claimed that the employer maintained a practice of making subjective promotion decisions. There, as here, the plaintiff relied on statistical evidence comparing the percentage of promotions awarded to African-American employees with the expected percentage based on the overall African-American population in the

department at issue. In response to the plaintiff's contention that the lower court's analysis of the statistical evidence "constituted an impermissible premature inquiry into the merits of [plaintiff's] claim," *id.* at 1275, the Eighth Circuit concluded that the lower court did not abuse its discretion by analyzing this evidence and finding it "too bareboned" to justify class certification. *Id.* at 1276.

Similarly, in *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267 (4th Cir. 1980), the plaintiffs claimed that promotion and related decisions were being made based on excessively subjective criteria. There, as here, the plaintiffs sought certification of a broad class encompassing multiple facilities, notwithstanding the fact that the challenged decisions were made on a decentralized basis by the plaintiffs' immediate supervisors. In overturning the lower court's grant of class certification, the Fourth Circuit faulted the plaintiffs' statistical evidence of state-wide racial disparities because there was no showing that "overall disparities were paralleled in the separate facilities or even a statistically reliable sample of them." *Id.* at 278-79.

The Second Circuit's conclusion that the District Court could not evaluate the expert reports for this purpose cannot be harmonized with the rulings of the Fourth and Eighth Circuits.[2]

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[2] The *Caridad* decision cannot even be harmonized with prior precedent in the Second Circuit. Prior to *Caridad*, the Second Circuit's leading authority on this issue, *Sheehan v. Purolator, Inc.*, 839 F.2d 99, 103 (2d Cir.), *cert. denied*, 488 U.S. 891 (1988), upheld the denial of a motion for class certification and, in so doing, approved the lower court's findings that: (i) the omission of variables from a regression analysis reduced the probative value of plaintiffs' statistical evidence; and (ii) plaintiffs' statistical analysis failed to take into account various relevant non-discriminatory factors such as job level, education and

(continued...)

Indeed, the statistical report relied on by plaintiffs was no different in kind than the evidence that was evaluated and rejected in *Chaffin* and *Stastny*. Furthermore, consistent with the distinction between the merits and the class determination drawn by this Court in *Falcon*, the report submitted by Metro-North's expert focused, not on whether Metro-North was engaged in a pattern and practice of discrimination, but on the question whether there was statistical evidence to support the inference that the acts of discrimination alleged by the named plaintiffs were occurring on a class-wide basis. In other words, Metro-North sought through its expert to show what plaintiffs' statistical report *meant* in terms of class certification, not whether it *proved* the ultimate claims of discrimination. *See Hopewell*, 79 F.R.D. at 694 n.2.

By concluding that the District Court could not evaluate plaintiffs' statistical report for this purpose, the Second Circuit has construed the applicable Supreme Court authorities in a manner that is completely at odds with the interpretation of the Fourth and Eighth Circuits, as well as the numerous authorities that have permitted a rigorous evaluation of the commonality issue notwithstanding its overlap with the evaluation of the merits of the case. Because these circuits are now divided on an issue that so fundamentally affects the adjudication of class certification motions, this Court should grant certiorari in order to resolve the question forthwith.

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[2](...continued)

work experience. Notwithstanding the Second Circuit's characterization of the expert reports in this case as "statistical dueling," the District Court's analysis of those reports was no more rigorous, and no more invasive of the merits, than the analysis performed in *Sheehan*.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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New York, New York
December 20, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1998

Argued: April 5, 1999 Decided: July 29, 1999

Docket Nos. 98-7825, -7837, -7855, -7857

VERONICA CARIDAD, individually and on behalf of all others similarly situated, ET AL.,

Plaintiffs-Appellants,

— v. —

METRO-NORTH COMMUTER RAILROAD,

Defendant-Appellee.

B e f o r e:

NEWMAN, WALKER, and SACK,
Circuit Judges.

Appeal from the May 15, 1998, judgment, of the United States District Court for the Southern District of New York (Jed S. Rakoff, District Judge), denying class certification in Title VII suit alleging racial discrimination with regard to discipline and promotion, and dismissing Plaintiff Caridad's claim of sexual harassment.

Affirmed as to Caridad; reversed as to denial of class certification and remanded. Judge Walker dissents in part with a separate opinion, disagreeing with the class certification ruling.

JOHN R. QUINN, Bay Shore, N. Y. (Alan L. Fuchsberg, Andrew J. Carboy, Molly A. Hunter, Jacob D. Fuchsberg Law Firm, New York, N. Y.; Russell Adler, Law Student, St. John's University, on the brief), *for plaintiffs-appellants.*

MYRON D. RUMFELD, New York, N. Y. (Gregory D. Wong, Proskauer Rose, New York, N.Y., on the brief), *for defendant-appellee.*

JON O. NEWMAN, *Circuit Judge.*

This appeal primarily concerns the commonality and typicality requirements of Rule 23(a) of the Federal Rules of Civil Procedure. The specific issue is whether these requirements can be met in a Title VII action where the members of the proposed class challenge the subjective components of company-wide policies and procedures governing employee discipline and promotion. This issue arises on an appeal by several of the named plaintiffs in a proposed class action against Metro-North Commuter Railroad ("Metro-North") from the May 15, 1998, judgment of the District Court for the Southern District of New York (Jed S. Rakoff, District Judge). The judgment incorporated a prior ruling denying the Class Plaintiffs' motion for certification of a proposed class consisting of current and former

African-American employees of Metro-North, and dismissed all claims, subject to a stipulation preserving the rights of some of the Plaintiffs to appeal the class ruling. In addition, Veronica Caridad, one of the named Plaintiffs, appeals only from that part of the judgment dismissing her individual claim of sexual harassment.

We reverse the District Court's judgment to the extent that it denied class certification. The Plaintiffs are challenging the delegation to supervisors, pursuant to company-wide policies, of the authority to make subjective decisions regarding employee discipline and promotion; under these circumstances the requirements of Fed. R. Civ. P. 23(a) can be satisfied, and are satisfied in this case. We affirm the District Court's dismissal of Caridad's individual claim because Metro-North has satisfied the requirements recently articulated by the Supreme Court for an affirmative defense to Title VII liability.

Background

I. Class Plaintiffs and Their Claims

The Class Plaintiffs are the named plaintiffs in two related actions consolidated by the District Court.[1] The proposed class consists of all African-American employees of Metro-North for the period from 1985 through 1996 -- an estimated 1,300 persons.

The Class Plaintiffs allege that Metro-North's company-wide policies for employee discipline and promotion delegate to department supervisors substantial authority to make discretionary decisions about discipline and promotion that is exercised in a racially discriminatory manner and has a disparate impact on African-American employees. Following extensive discovery, the plaintiffs moved for class certification pursuant to Rule 23. In support of their allegations of

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[1] Seven of the named plaintiffs have not appealed.

systematic disparate treatment and disparate impact, the Plaintiffs submitted a report prepared by Dr. Harriet Zellner, the testimony of a sociologist, the testimony of Metro-North's own officers, and anecdotal evidence. Dr. Zellner's report was based on various multiple regression analyses performed on data files provided by Metro-North. In opposition to the motion for class certification, Metro-North submitted the report of Dr. David Evans, which attacked the methodology and conclusions of Dr. Zellner.

(a) Disciplinary Policy and Procedure

Pursuant to some sixteen collective bargaining agreements, Metro-North's disciplinary system, the "Progressive Disciplinary System" or "PDS," applies to all of the approximately 5,000 union employees at Metro-North, wherever employed in the company. Metro-North's Labor Relations Department oversees the PDS. In addition, Metro-North trains the PDS hearing officers in day-long sessions coordinated by the Labor Relations Department, and the hearing officers receive an official Metro-North Hearing Officers' Manual.

Pursuant to the PDS, a supervisor or manager may bring "charges" against a union employee for misconduct, including, violations of Metro-North's policies, procedures, and safety rules. Approximately 400 supervisors and managers have the authority to bring such charges. The charges are investigated by a hearing officer who is responsible for gathering evidence and presenting it at a hearing where the employee is represented by his or her union. A transcript of the hearing is presented to the charging supervisor, who determines what, if any, discipline to impose. Union employees may appeal any sanction pursuant to the procedures set forth in the collective bargaining agreements and the Railway Labor Act, 45 U.S.C. §§ 152 *et seq*. An assistant director of the Labor Relations Department conducts an initial review of the appeal, and a three-member Special Board of Adjustment, chaired by a neutral arbitrator, conducts the final review.

In a 1994 memorandum, Metro-North's Affirmative Action Director, Stephen Mitchell, voiced concern about the high percentage of disciplinary cases involving people of color. Also in 1994, because African-American and female employees in one department had complained of discrimination by their supervisor, Mitchell proposed that Metro-North review the disciplinary activities in that department from 1992 to 1993 to determine "if protected class employees have been unfairly disciplined."

Nineteen of the twenty-seven named Plaintiffs allege that they were unfairly disciplined because of their race.

(b) Promotion Policy

Metro-North's declared policy for filling management positions is to promote from within its own ranks. Between 60 and 80 percent of management positions are filled in this manner. The declared promotion policy requires the posting of all open management positions. The Personnel Department oversees posting of positions, receives and reviews applications, and maintains job title guidelines and pay structure. Although the Personnel Department assembles a list of qualified applicants, the manager of the department with a vacancy makes the final decision. The manager is directed to hire the most qualified candidate, but no other instructions are given.

Several of the named plaintiffs allege that these policies are not strictly adhered to; in particular, they allege that positions are not always posted and, even when they are, that it is well known who will receive the position before it is posted. Furthermore, some positions are filled through exceptions to the posting requirements, which the plaintiffs allege contribute to racial bias in promotions. In addition, approximately 200 union positions at Metro-North, which are viewed as positions that might facilitate promotion to a management position, are not governed by the formal promotion protocol. Hiring decisions in these positions — labeled "partially excepted positions" and "agreement supervisors" — are left entirely to the individual manager's discretion; the Personnel Department does not

participate in the hiring process. The named Plaintiff Joseph Kimbro applied for and was denied promotion to the partially excepted position of chief crew dispatcher. He alleges that Metro-North promoted four White employees, whom Kimbro had trained and all with less experience than he had, to this position.

Historically, Metro-North has been predominantly male and White, and the company's employment statistics show that African-Americans are not well-represented in management positions or in those positions in the Metro-North workforce from which promotions to management are made. Internally produced reports that Metro-North submits to the Federal Transit Administration show underutilization of African-Americans in five of the eight job categories applicable to Metro-North. Most striking, African-Americans could be expected, based on census figures for the New York metropolitan area, to fill 58.8 percent of the skilled-craft jobs but in fact filled only 15 percent of such jobs.

(c) The Experts' Reports

Based on the results of numerous multiple regression analyses, the Class Plaintiffs' expert, Dr. Zellner, concluded that the "effect of being black on number of disciplinary charges over the 1990-to-1994 period was positive and highly significant statistically." Similarly, she concluded that the effect of being Black on the likelihood of being promoted from 1985-to-1994 was negative to a degree that was highly significant statistically. Dr. Zellner's analyses were run on eleven computer files provided by Metro-North -- one for each of the ten years from 1985 to 1994 (providing basic data such as job title, hire date, last promotion date, termination date, department, race, and sex) and one providing information on disciplinary proceedings. She describes how she attempted to isolate the effect of race on the likelihood of discipline:

> In order to estimate the net effect of being black on discipline over the 1990-to-1994 period, we first defined the dependent variable . . . as the number of

disciplinary charges recorded for each employee as of the end of this period. Next we obtained measurements on five variables -- age, years with the company prior to 1990, years with the company from 1990 onwards, department, and union vs. management status -- that we expected would affect an employee's chances, regardless of race, of becoming involved in the disciplinary process. We then estimated the effect of being black on number of disciplinary charges, controlling for these variables.

In assessing the effect of race on promotion, Dr. Zellner controlled for years of tenure, department, and union status.

Based on her analysis, Dr. Zellner concluded that Blacks, on average, faced .7 disciplinary charges, which was 31/2 times the amount for Whites, who faced, on average, .2 disciplinary charges. According to Zellner, the probability of this occurring by chance is less than one in 10,000. Accordingly, she concluded that the estimated effect of race on being disciplined is highly significant statistically. The results of her regression analyses with respect to promotion were similar; being Black reduced an employee's likelihood of promotion by approximately 33 percent.

In opposition to class certification, Metro-North submitted a critique of Dr. Zellner's report prepared by its expert, Dr. Evans. Dr. Evans noted that Metro-North has decentralized disciplinary and promotion processes and that, "[a]s a result of this decentralization, an organization-wide pattern and practice of discrimination is . . . implausible." Dr. Evans opined that Dr. Zellner's conclusions to the contrary resulted from "her failure to account for differences that arise by department and position as well as her failure to take into account any specifics of the situation at Metro-North."

Evans' primary criticism of Zellner's report is that her analysis was done on a company-wide basis and not on a position-by-position basis. He stated that her results are examples of the "fallacy of composition," *i.e.*, that she had

created a statistical illusion of disparity by aggregating data across many different job titles. Based on his analysis of the data, Evans concluded that the experiences of the named Plaintiffs were, "at best, typical of only a fraction of the Metro-North workforce." In particular, he pointed out that of 37 particular departments at Metro-North, no disciplinary action was taken in 25 of them during the relevant period. He also reported that in departments where disciplinary action had been taken, there was considerable variation from job to job. Significantly, Evans did not perform any regression analyses in reaching his conclusions; instead, he simply tallied numbers of disciplinary actions and made some basic comparisons.

Furthermore, Evans concluded that for two infractions that can be objectively documented--substance abuse and failure to remit--the higher rates of discipline of Blacks corresponded to the higher incidence of infractions by Blacks. Evans dismissed Zellner's findings on discipline, stating that her method "cannot show discrimination because blacks could, on average, work for supervisors who mete out more discipline to workers of all races, work in departments where all workers are more severely disciplined, or have committed more violations than whites."

With respect to promotion, Evans again cited Zellner's failure to perform a position-by-position analysis; in addition, he criticized Zellner for including "non-promotable positions" in her data pool, which, he contended, created the statistical illusion that Blacks are less likely to be promoted than Whites. He noted that the overall rates of promotion are 12.7 percent for Whites and 8.1 percent for Blacks. However, when he excluded jobs for which the promotion rate was less than one percent, he found little difference in promotion rates by race (20.3 percent for Whites versus 19.4 percent for Blacks).

In response to Evans' critique, Zellner prepared a supplemental report. The report argued that Evans "defin[ed] away" the possibility of a system-wide pattern of discrimination by taking that term to require either a centralized policy of discrimination or concerted action by all supervisors. Zellner

also attacked what she characterized as arbitrary selection of data and Evans' failure to perform regression analyses on the data he considered. Furthermore, she prepared a department-by- department comparison of the number of job titles in which Blacks and Whites, respectively, had higher discipline rates. This analysis showed that Blacks had higher discipline rates in 48 positions, in which 4,266 people were employed. Whites, on the other hand, had higher rates of discipline in 21 positions, and only 543 employees were employed in those positions. Zellner also performed department-by-department regression analyses to estimate the effect of being Black on the number of disciplinary charges within each department. In all departments, the effect of being Black was positive; in only one of the ten departments was the effect not statistically significant.

(d) The District Court's Decision

In August 1997, the District Court denied the Class Plaintiffs' request for class certification. *See Robinson v. Metro-North Commuter Railroad Co.*, 175 F.R.D. 46 (S.D.N.Y. 1997). The Court found Dr. Zellner's report unpersuasive:

> [D]efendant has satisfied the Court that the plaintiffs' statistics, even taken most favorably to plaintiffs, cannot carry their burden here, because they fail to take account of the fact that different Metro-North positions have materially different individual rates of discipline and of promotion associated with them. Unless these differences are taken into account, plaintiffs' global statistics are meaningless. Conversely, when these differences are taken into account, no statistically significant racial disparities, either for discipline or promotion, can be established with respect to the great majority of positions at Metro-North. Thus, plaintiffs' statistics are inadequate to carry their burden of establishing commonality as to the company-wide class here sought to be certified.

Id. at 48 (citations omitted). The Court further found that the infirmities in the statistics were not cured by the affidavits submitted because they related only to each affiant's individual claim of discrimination. *See id.* at 48-49.

In addition, the Court noted a "more fundamental problem" with the Plaintiffs' attempt to demonstrate commonality:

> [E]ven while seeking certification of a company-wide class, [plaintiffs] concede that defendant's standardized, company-wide policies and procedures relating to discipline and promotion are (and were at all relevant times) non-discriminatory. Their claim is that discrimination enters the picture only because defendant does not strictly adhere to its own policies governing discipline and promotion, but, rather, delegates broad authority for decision-making in promotions and discipline to its management personnel. This alleged policy of overdelegation is of no moment, however, in the absence of any proof that it opens the door to generalized discrimination. Here, as mentioned, neither plaintiffs' statistics nor [their] sociological opinion meaningfully supports such an inference.

Id. at 49. For these reasons, the Court concluded that the Plaintiffs had failed to demonstrate commonality and typicality. The Class Plaintiffs moved for reargument; the District Court denied the motion during oral argument on Metro-North's motion for summary judgment on the individual claims of the named Plaintiffs.[2]

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[2] The District Court dismissed all but five of the claims challenged by Metro-North. These claims were later settled and dismissed, subject to a stipulation preserving the right to appeal the denial of the class certification.

II. Caridad

Veronica Caridad, an African-American woman, began working for Metro-North in September 1992; after completing her training, she worked as an electrician until April 1995, when she resigned. Caridad was the only female working her shift, which included 12 men.

Caridad alleges that from March through September of 1994, her male supervisor, Will Clarke, sexually harassed her. She alleges several episodes, which included unwanted sexual touchings. During her deposition, Caridad testified that after these incidents she found it difficult to do her job because she "didn't know when [Clarke] was going to do this," and "every day [she felt she] could be subject to" another attack. In addition, Caridad alleges that she was treated hostilely by her male co-workers: one allegedly told her that "nobody cares what happens to you" and that she had "walked into a lion's den." She also stated that her work was unfairly criticized because of her sex.

Despite Metro-North's sexual harassment policy and the availability of procedures for lodging complaints, Caridad failed to report this harassment, at least initially. However, at a disciplinary hearing concerning her absenteeism, Caridad broke down, became very emotional, and complained of being sexually harassed. Caridad eventually spoke to Stephen Mitchell, Metro-North's Director of Affirmative Action, but she did not tell him the specifics of the attacks. Indeed, Caridad testified that although she complained that she was treated poorly, she never mentioned Clarke's sexual harassment to Mitchell. She further testified that she did not want Metro-North to investigate her complaints because she did not think an investigation would improve matters. She stated that she did not trust Metro-North or its equal employment office.

By letter dated February 10, 1995, Mitchell advised Caridad that, in light of her expressed wishes, he would not take further action until April. Despite Caridad's continued refusal to

provide details about her harassment, Metro-North offered to transfer her to another shift; in addition, she was offered a service attendant position. Caridad declined the transfer, stating that she did not feel it would solve the problem because the other work site was also predominantly male.

On April 27, Caridad resigned from Metro-North. By letter dated May 11, Mitchell informed Caridad that "[b]ased on your failure to contact me regarding the investigation/resolution of your internal discrimination complaint, I am administratively closing your complaint as of today."

Based on these facts, Metro-North moved for summary judgment, arguing that it could not be held liable for sexual harassment because Caridad had refused to cooperate in its efforts to investigate her complaint. On January 15, 1998, the District Court dismissed Caridad's sexual harassment claim. The Court stated:

> [A]lthough Veronica Caridad complained of inappropriate physical contact and comments by co-workers and supervisors, she refused to cooperate with the investigation commenced by Metro-North into her allegations. Accordingly, even if these incidents could constitute harassment, the acts complained of cannot be imputed to Metro-North.

Discussion

I. Class Certification

"Provided that the district court has applied the proper legal standards in deciding whether to certify a class, its decision may only be overturned if it constitutes an abuse of discretion." *Lundquist v. Security Pacific Automotive Financial Services Corp.*, 993 F.2d 11, 14 (2d Cir. 1993) (citation and internal quotation marks omitted). However, we are "noticeably less deferential to the district court when that court has denied class status than when it has certified a class." *Id.* (citing *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993)).

The party seeking to certify a class bears the burden of demonstrating numerosity, commonality, typicality, and adequacy. *See* Fed. R. Civ. P. 23(a). Here, we are concerned with the commonality and typicality criteria. As courts have noted, these requirements "tend to merge" because "[b]oth serve as guideposts for determining whether . . . the named plaintiff's claim and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence." *General Telephone Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Before certifying a class, a district court must be persuaded, "after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161.

Nevertheless, a motion for class certification is not an occasion for examination of the merits of the case. *See Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 570-72 (2d Cir. 1982). As the Supreme Court has stated, "[N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

In this case, the District Court denied the motion for class certification because it concluded that Metro-North's policy of delegating discretionary authority to supervisors to make certain employment decisions affecting discipline and promotion precluded a finding of commonality and typicality. The Class Plaintiffs, on the other hand, argue that it is this policy--the delegation to supervisors, pursuant to company-wide policies, of discretionary authority without sufficient oversight--that gives rise to common questions of fact warranting certification of the proposed class. The Class Plaintiffs contend that this policy (i) has resulted in a pattern and practice of racial discrimination and (ii) has a disparate impact on African-American employees at Metro-North.

Though proving that the grant of discretionary authority to supervisory employees either results in a pattern and practice of discrimination or affects one class of employees more harshly than others is likely to be extremely difficult, *cf. Woodbury v. New York City Transit Authority*, 832 F.2d 764, 771 (2d Cir. 1987) ("Where challenged employment practices are decentralized and uncoordinated . . . statistics, though relevant, may be less significant in demonstrating bias than where a single office makes all employment decisions.") (citation and internal quotation marks omitted), the fact that the Class Plaintiffs challenge the subjective components of company-wide employment practices does not bar a finding of commonality under either the disparate treatment or disparate impact model. In *Falcon*, the Supreme Court noted that, under certain circumstances, disparate treatment cases challenging subjective decision-making processes could be certified as class actions. *See* 457 U.S. at 159 n.15 ("Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class . . . if the discrimination manifested itself . . . in the same general fashion, such as through entirely subjective decision-making processes."); *Shipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir. 1993) (affirming class certification where supervisors had authority to make subjective personnel decisions and noting that "[a]llegations of similar discriminatory employment practices, such as the use of entirely subjective personnel processes that operate to discriminate, satisfy the commonality and typicality requirements"). And, it is beyond dispute that the disparate impact analysis may be applied to subjective, as well as objective, employment practices. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988). We see no reason to limit this principle to individual claims of disparate impact. Other courts have reached the same conclusion. *See, e.g., Barefield v. Chevron U. S. A., Inc.*, 1987 WL 65054, at *3-*4 (N.D. Cal. Sept. 9, 1987) (commonality found where managers made subjective employment decisions but were "controlled by uniform, centralized management organization" that oversaw a uniform promotion system and evaluation process).

Of course, class certification would not be warranted absent some showing that the challenged practice is causally related to a pattern of disparate treatment or has a disparate impact on African-American employees at Metro-North. Where the decision-making process is difficult to review because of the role of subjective assessment, significant statistical disparities are relevant to determining whether the challenged employment practice has a class-wide impact. *See Barefield*, 1987 WL 65054, at *3 (citing cases); *cf. International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977) ("Statistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a telltale sign of purposeful discrimination. . . . In many cases, the only available avenue of proof is the use of racial statistics . . . ."") (citations and internal quotation marks omitted). Regardless of their ultimate persuasiveness on the issue of liability, the statistical report and anecdotal evidence submitted by the Class Plaintiffs are sufficient to demonstrate common questions of fact regarding the discriminatory implementation and effects of Metro-North's company-wide policies regarding promotion and discipline.

The District Court relied on the report of Metro-North's statistical expert, Dr. Evans, to conclude that the Class Plaintiffs' statistics were inadequate because they failed to take into account the fact that various Metro-North positions have materially different rates of discipline and promotion. Though Metro-North's critique of the Class Plaintiffs' evidence may prove fatal at the merits stage, the Class Plaintiffs need not demonstrate at this stage that they will prevail on the merits. Accordingly, this sort of "statistical dueling" is not relevant to the certification determination. *See, e.g., Krueger v. New York Telephone Company*, 163 F.R.D. 433, 440-41 (S.D.N.Y. 1995). We conclude that the Class Plaintiffs' statistical evidence supports a finding of commonality on the issue of discipline with respect to those African-American employees who were disciplined while working in one of the 48 positions in which African-Americans are more likely to be disciplined than Whites. In addition, the statistical evidence supports a

finding of commonality on the promotion claim. The Class Plaintiffs submitted evidence that tends to establish that being Black has a statistically significant effect on an employee's likelihood of being promoted; indeed, being Black reduces an employee's likelihood of promotion by approximately 33 percent. In conducting her analyses, the Class Plaintiffs' expert controlled for various factors that one would expect to be relevant to the likelihood of disciplinary action and promotion. These statistical disparities are not insignificant. *Cf. Watson*, 487 U.S. at 994-95. More detailed statistics might be required to sustain the Plaintiffs' burden of persuasion, *see Wards Cove Packing Company v. Atonio*, 490 U.S. 642, 650-55 (1989), but this report, in conjunction with the anecdotal evidence, satisfies the Class Plaintiffs' burden of demonstrating commonality for purposes of class certification.

The Class Plaintiffs also satisfied their burden of demonstrating typicality, which, as noted, tends to merge with the commonality requirement. This criterion does not require that the factual background of each named plaintiff's claim be identical to that of all class members; rather, it requires that the disputed issue of law or fact "occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class." *Krueger*, 163 F.R.D. at 442 (citation and internal quotation marks omitted). Nineteen of the named Plaintiffs allege that they have been subjected to discipline pursuant to Metro-North's company-wide "PDS" as a result of racial discrimination. The fact that two of these Plaintiffs admitted that they had committed the infractions giving rise to the challenged disciplinary actions does not defeat a finding of typicality; indeed, one of the claims levied by the putative class is that African-American workers are disciplined for violations for which White workers are not. For these Plaintiffs, the question of whether Metro-North's system-wide PDS has resulted in a pattern and practice of discrimination or affects African-Americans more severely than other employees is central to their claims. Likewise, for the seven named Plaintiffs who alleged that they were not promoted as the result

of racial discrimination, the question of whether Metro-North's policy of delegating discretion to department supervisors to make subjective decisions regarding employee promotions is administered in a racially discriminatory manner or has a disparate impact on African-American workers is crucial to their claims, as well as to those of the proposed class.

In deciding a certification motion, district courts must not consider or resolve the merits of the claims of the purported class. *See Eisen*, 417 U.S. at 177. Here, the District Court credited Metro-North's expert evidence over that of the Class Plaintiffs. Such a weighing of the evidence is not appropriate at this stage in the litigation. Accordingly, we reverse the denial of class certification and remand the case for further proceedings. Those proceedings will include the District Court's consideration of whether the requirements of Rule 23(b) are met, a matter that the Court did not reach.

II. Caridad's Claim of Sexual Harassment

On appeal, Caridad makes two arguments in support of her claim that the District Court erred in dismissing her sexual harassment claim based on her failure to cooperate in Metro-North's attempted investigation of her complaint. First, she contends that Clarke's sexual harassment subjected her to a constructive discharge, and that such a discharge is a "tangible employment action" for which the employer is strictly liable without regard to an affirmative defense, under the Supreme Court's recent decisions concerning employer liability for Title VII violations by supervisors, *see Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998). Alternatively, she argues that even if her constructive discharge is not a tangible employment action, Metro-North cannot satisfy the standard articulated by the Court in *Ellerth* and *Faragher* for an employer's affirmative defense to strict liability under Title VII.

In *Ellerth* the Supreme Court held that

> [a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 524 U.S. at___, 118 S. Ct. at 2270 (citation omitted); *see also Faragher*, 524 U.S. at ___, 118 S. Ct. at 2292-93.

Contrary to Caridad's assertion, constructive discharge does not constitute a "tangible employment action," as that term is used in *Ellerth* and *Faragher*. In determining when an employer may be held strictly liable for the discriminatory acts of its supervisory employees, the Court focused on the following language of the Restatement (Second) of Agency: "A master is not subject to liability for the torts of his servants acting outside the scope their employment, unless: . . . (d) the servant . . . was aided in accomplishing the tort by the existence of the agency relation." Restatement (Second) of Agency § 219(2) (1957). In searching for a principled limitation of the "aided by the agency relation" concept, the Supreme Court concluded that the requirement of a tangible employment action by the harassing supervisor would ensure that employer liability would be imposed without the possibility of an affirmative defense only where the employer is implicated in the harm visited upon the employee by his or her supervisor:

> When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. . . . As a

> general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury. A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. But one co-worker . . . cannot dock another's pay, nor can one co-worker demote another. . . . The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.
>
> . . . A tangible employment decision requires an official act of the enterprise, a company act. . . .
>
> For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. . . .

Ellerth, 524 U.S. at ___, 118 S. Ct. at 2269 (citation omitted); *see also Faragher*, 524 U.S. at ____, 118 S. Ct. at 2290-92. Co-workers, as well as supervisors, can cause the constructive discharge of an employee. And, unlike demotion, discharge, or similar economic sanctions, an employee's constructive discharge is not ratified or approved by the employer.

Moreover, the facts of *Ellerth*, where the plaintiff, like Caridad, did not complain of the harassment prior to quitting her job, indicate that constructive discharge is not a tangible employment action depriving the employer of the availability of the affirmative defense to Title VII liability. Ellerth alleged that she had been constructively discharged as a result of sexual harassment by her supervisor, *see Ellerth*, 524 U.S. at ____, 118 S. Ct. at 2263; in remanding the case for a determination of whether the employer could make out an affirmative defense, the Supreme Court noted that "*Ellerth* has not alleged she suffered a tangible employment action at the hands of [her supervisor]," *id.* at____, 118 S. Ct. at 2271.

Thus, although we have stated in another context that "[w]hen a constructive discharge is found, an employee's resignation is treated . . . as if the employer had actually discharged the employee," *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987), constructive discharge is not a tangible employment action warranting the imposition of strict liability under the *Ellerth/Faragher* standard. Accordingly, we must determine whether Metro-North has demonstrated that it is entitled to the *Ellerth/Faragher* affirmative defense.

As noted above, in the absence of a tangible employment action, an employer can avoid liability for a supervisor's harassment of a subordinate if it demonstrates that (a) it exercised reasonable care in preventing and correcting any sexually harassing behavior and (b) the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities. Caridad asserts that there is no evidence that Metro-North exercised reasonable care to prevent Clarke's behavior and that her failure to file a formal complaint and assist in the investigation of her claims was not unreasonable under the circumstances.

An employer need not prove success in preventing harassing behavior in order to demonstrate that it exercised reasonable care in preventing and correcting sexually harassing conduct. Although not necessarily dispositive, the existence of an anti-harassment policy with complaint procedures is an important consideration in determining whether the employer has satisfied the first prong of this defense. *See Faragher*, 524 U.S. at ___, 118 S. Ct. at 2293 ("While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense."); *see also Fierro v. Saks Fifth Avenue*, 13 F. Supp. 2d 481, 491 (S.D. N.Y. 1998) (noting that the existence of an anti-harassment policy with complaint procedure is "an important, if not dispositive, consideration"). It is not disputed that Metro-North had an

anti-harassment policy with a procedure for filing complaints. Furthermore, the undisputed facts of Caridad's case indicate that Metro-North endeavors to investigate and remedy problems reported by its employees. Under these circumstances, Metro-North exercised reasonable care to prevent and correct sexually harassing behavior.

With respect to the second prong of the affirmative defense, Caridad asserts that it was reasonable for her to be hesitant in speaking about the events. We do not doubt that there are many reasons why a victimized employee may be reluctant to report acts of workplace harassment, but for that reluctance to preclude the employer's affirmative defense, it must be based on apprehension of what the employer might do, not merely on concern about the reaction of co-workers. Caridad's reasons are not based on a credible fear that her complaint would not be taken seriously or that she would suffer some adverse employment action as a result of filing a complaint. Her reasons for not complaining to her employer are insufficient to preclude summary judgment in favor of Metro-North. *See Faragher*, 524 U.S. at ___, 118 S. Ct. at 2293 ("[W]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense."). In creating the affirmative defense to vicarious liability for the acts of supervisors, the Supreme Court sought to "accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees." *Faragher*, 524 U.S. at ___, 118 S. Ct. at 2292. Here, the facts reveal that Metro-North is entitled to an affirmative defense against Title VII liability for the alleged conduct of Caridad's supervisor.

Conclusion

We reverse the District Court's judgment to the extent that it denied certification of the proposed class and affirm to the extent that it dismissed Caridad's sexual harassment claim.

WALKER, *Circuit Judge, dissents in part*:

I join in that portion of the majority's opinion that affirms the dismissal of the claims of Veronica Caridad. However, with respect to the majority's view that the district court erred in denying class certification, I respectfully dissent.

Although it is true that our court's review should be somewhat more probing when a district court denies class certification than when it grants it, *see Lundquist v. Security Pac. Automotive Fin. Servs. Corp.*, 993 F.2d 11, 14 (2d Cir. 1993) (*per curiam*), our standard of review still remains one of abuse of discretion, *see id.*; *Johnpoll v. Thornburgh*, 898 F.2d 849, 852 (2d Cir. 1990) (*per curiam*). The district court acted well within its discretion when it denied class certification in this case. It is the duty of a district court faced with the question of class-action certification to scrutinize the available evidence, make factual findings where necessary and conduct "a 'rigorous analysis' to determine whether Rule 23(a) has been satisfied." *Sheehan v. Purolator, Inc.*, 839 F.2d 99, 103 (2d Cir. 1988) (quoting *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982)). The question that the district court had to decide in this case was whether plaintiffs had established common questions of law or fact sufficient to meet the commonality and typicality requirements of Rule 23(a). I do not believe that they did. Simply alleging that the proposed class was all employees of Metro-North, and that they were members of an identifiable group of persons based on race, is, of course, insufficient to meet Rule 23(a)'s commonality and typicality requirements. Instead, discrimination plaintiffs must identify a common policy or practice, to which they were all subjected, that resulted in

discrimination. This is what the Supreme Court meant when it said in *Falcon* that

> Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination. The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer.

Falcon, 457 U.S. at 159 n.15 (emphasis in original). As a matter of law, I cannot agree with the majority that Metro-North's practice of delegating personnel decisions—plaintiffs prefer to call it "overdelegation"—constitutes a policy or practice sufficient to satisfy the commonality requirement of Rule 23(a).

In my opinion, the district court should not have considered both parties' expert reports at the class certification stage. Although this evidence would be relevant to a determination of the merits of plaintiffs' discrimination claim, it was not relevant to a determination of the propriety of certifying a class. Plaintiffs have never argued that Metro-North, at the highest levels, has a hidden policy of discrimination that could be smoked out by showing disparate impact throughout the company. Plaintiffs have conceded that Metro-North does not have a policy of discrimination. Indeed, it is undisputed that the company has written anti-discrimination policies applicable to all departments. Plaintiffs contend instead that certain department managers violate these policies by discriminating, and that it is Metro-North's policy of delegating to these managers the authority to promote and discipline that renders Metro-North liable for discrimination. Given this theory of the case, the district court should have deferred consideration of the expert reports until it was time to consider the merits of the discrimination claim. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974); *Schweizer v. Trans. Union Corp.*, 136 F.3d 233, 239 (2d Cir. 1998). Even though the district

court's consideration of this evidence was premature, however, the district court's ultimate conclusion that there was no common question of law or fact to plaintiffs' claims sufficient to meet Rule 23(a)'s commonality and typicality requirements should be affirmed.

I do not know whether there might be one or more groups of employees within particular departments at Metro-North, who were subjected to common discriminatory practices or policies by specific department heads, that might properly be certified as classes under Rule 23(a); the issue is not before us. But, in the absence of some affirmative practice leading to discrimination by Metro-North — beyond the quite normal management practice of delegating personnel responsibility to departmental managers under the umbrella of an established anti-discrimination policy — I do not agree with the majority that the commonality and typicality requirements of Rule 23(a) are satisfied and that company-wide class certification is warranted, much less that the district court abused its discretion in denying it.

I respectfully dissent.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of October one thousand nine hundred and ninety-nine.

Norris,

Plaintiff-Appellant,

v.

Metro-North,

Defendant-Appellee.

Dkt Nos: 98-7825(L), 98-7837 (CON), 98-7855 (CON), 98-7857 (CON)

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant and the appellee.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON, Acting Clerk

By: /s/
Beth J. Meador,
Administrative Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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94 Civ. 7374 (JSR)

CHARLES ROBINSON, SHARON E. MACK, JAMES OLIVER, JOAN WOODBERRY, JAMES K. HUNT, DARRYLL F. SIMPSON, VERONICA CARIDAD, ELAINE ESTER, DONALD HINES, JAMES JACKSON, CYNTHIA KING, ANTHONY ELLIS, PRINCE TILLERY, HELEN PEREZ, LORD TAYLOR, DORETHEA RICHARDSON, EARL VAUGHN, TERESA WHYTE, DWAYNE SCOTT, and GLENROY LIBURD,

Plaintiffs,

-v-

METRO-NORTH COMMUTER RAILROAD COMPANY,

Defendant.

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95 Civ. 8594 (JSR)

RAYMOND NORRIS, MARVIN EDWARDS, ERIC JONES, DANIEL CANADA, and GIESELE MIGUEL,

Plaintiffs,

-v-

METRO-NORTH COMMUTER RAILROAD COMPANY,

Defendant.

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

Plaintiffs in these two cases sued defendant Metro-North Commuter Railroad for employment discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964 and various laws of the State of New York, and moved for class certification pursuant to Federal Rule of Civil Procedure 23(b)(2) and consolidation of their actions pursuant to Federal Rule of Civil Procedure 42(a). Following reassignment of the case to this Court on March 1, 1997, the Court convened a conference on March 12, 1997, at which, on defendant's consent, the Court granted plaintiffs' motion to consolidate, see 3/12/97 Transcript at 31, and set a firm schedule to have the case trial-ready by September 1997. Subsequently, after consideration of the parties' written submissions and oral arguments, the Court telephonically advised the parties on April 2, 1997 that the motion for class certification would be denied. This memorandum will serve to confirm that latter ruling and briefly state the reasons therefor.

The 25 plaintiffs in these two actions are present or former Metro North employees, who have served in seven of Metro-North's 37 departments and have held 12 of Metro-North's 220 employee slottings. One of the plaintiffs is a Pacific Asian Islander, the rest African-Americans. Although most of the plaintiffs are union members, one holds a non-agreement position and three others work for an employment agency that assigned them to work on Metro-North's premises. The plaintiffs allege discrimination on varying bases, including individually varying incidents of racial discrimination, age discrimination, gender discrimination, disability discrimination, and religious discrimination. Additionally, however, both Complaints allege as a general matter that Metro-North engages in company-wide discriminatory practices against African-American employees. On the basis of these company-wide allegations, plaintiffs seek to certify a class of "all African-American employees of defendant Metro-North

Commuter Railroad from 1983 through 1996." This proposed class would include all such former or present African-American employees of Metro-North who are either union employees or lower- to middle-level management.

It is well established that the party seeking class certification bears the burden of showing that the requirements of numerosity, commonality, typicality and adequacy of representation set forth in Fed. R. Civ. P. 23(a) have been satisfied and that the putative class falls within one of the three categories set forth in Rule 23(b). Achem Products, Inc. v. Windsor, __ U.S. __, __, 117 S. Ct. 2231, 2245 (1997); Comer v. Cisneros, 37 F.3d 775, 796 (2d Cir. 1994). In this regard, the allegations set forth in the complaint are accepted as true, see Shelter Realty Corp. v. Allied Maintenance Corp., 574 F.2d 656, 661, n.15 (2d Cir. 1978); In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 501 (S.D.N.Y. 1996), but the Court is required to scrutinize the pleadings and other submissions to determine whether the prerequisites of Rule 23(a) have been met. See General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1982). Here, the Court, after a careful examination not only of the pleadings but also of the voluminous submissions provided by the parties following extensive class certification discovery,[1] concludes that the plaintiffs have failed to carry their burden with respect to both the commonality and the typicality requirements of Rule 23(a).[2] Accordingly, their

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1 Class certification discovery here included not only exchange of numerous documents, but also the depositions of 24 representative plaintiffs and 17 Metro-North officers and managers, and the exchange of expert reports and expert depositions.

2 Defendants do not challenge class certification on numerosity grounds. As for adequacy, because defendants challenge the adequacy of the class representatives on the

(continued...)

motion for certification must be denied. Krueger v. New York Tel. Co., 163 F.R.D. 433, 438 (S.D.N.Y. 1995).

The commonality component of Rule 23(a) requires plaintiffs to show that there are questions of law or fact common to the aggrieved class. Comer, 37 F.3d at 796; Krueger, 163 F.R.D. at 439. Commonality does not require that all class members have identical claims and arguments. Trief v. Dun & Bradstreet Corp., 144 F.R.D. 193, 198 (S.D.N.Y. 1992). But plaintiffs must make a more than conclusory showing that the defendant discriminated against the class members in some general fashion, even if some of its employees also practiced individual discrimination. See Falcon, 457 U.S. at 159 n.15; Open Housing Ctr., Inc. v. Samson Management Corp., 152 F.R.D. 472, 476 (S.D.N.Y. 1993).

In the instant case, plaintiffs attempt to establish commonality chiefly by reference to statistical data and sociological opinion. As to the first, plaintiffs claim there are meaningful statistical disparities between the frequency with which Metro-North disciplines its African-American employees versus the frequency with which it disciplines other employees, and similarly with respect to frequency of promotions. See Report of Dr. Harriet Zellner, dated May 14, 1996, at 3-7. But defendant has satisfied the Court that the plaintiffs' statistics, even taken most favorably to plaintiffs, cannot carry their burden here, because they fail to take account of the fact that different Metro-North positions have materially different individual rates of discipline and of

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[2](...continued)

same basis as it challenges their typicality, the adequacy component of Rule 23 will not be separately addressed. See Achem Products, 117 S. Ct. at 2251, n.20 (noting that the "adequacy of representation requirement 'tends to merge' with the commonality and typicality criteria of Rule 23(a)").

promotion associated with them. See Affidavit of David Evans, Ex. 1 at 7-18 (Report of Dr. David Evans, dated April 15, 1996). Unless these differences are taken into account, plaintiffs' global statistics are meaningless. See Sheehan v. Purolator, Inc., 103 F.R.D. 641, 649 (E.D.N.Y. 1984), aff'd, 839 F.2d 99 (2d Cir.), cert. denied, 488 U.S. 891 (1988); see also Woodbury v. New York City Transit Authority, 832 F.2d 764, 771 (2d Cir. 1987); Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 278-79 (4th Cir. 1980). Conversely, when these differences are taken into account, no statistically significant racial disparities, either for discipline or promotion, can be established with respect to the great majority of the positions at Metro-North. See Affidavit of David Evans, Ex. 1 (Report of David Evans, dated April 15, 1996). Thus, plaintiffs' statistics are inadequate to carry their burden of establishing commonality as to the company-wide class here sought to be certified. See Wards Cove Packing Co., Inc. v. Atonia, 490 U.S. 642, 649-57 (1989); see also Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994 (1988); Coser v. Moore, 739 F.2d 746, 750 (2d Cir. 1984).

As for the sociological opinion, even if one puts aside reservations one might have as to its ultimate admissibility under the standards of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), it consists on its face of little more than rank conclusion and gross speculation. For example, the opinion baldly premises that negative stereotypes result in African-American's being considered "inappropriate for higher level jobs" by defendant's managers. Affidavit of William T. Bielby, ¶12; Report of William T. Bielby, dated February 26, 1996 at ¶12. Similarly, the opinion simply presumes that Metro-North's personnel and disciplinary systems are inherently subjective and allow managers to materially circumvent policies that would reduce subjectivity and bias. Bielby Report ¶46. No meaningful weight can reasonably be attributed, even at this state of the proceedings, to a report so facially suspect.

These infirmities in the statistics and the sociological opinion are in no way cured by the other affidavits offered by plaintiffs in support of their motion. These six affidavits (from five plaintiffs and one other putative class member) relate on their face only to individual instances of alleged discrimination.[3] They hardly constitute a statistically significant number of aggrieved persons in a putative class of 1,300 employees. See Sheehan, 103 F.R.D. at 649; Ross v. Nikko Securities Co. Int'l, Inc., 133 F.R.D. 96, 97-98 (S.D.N.Y. 1990).

Problems of proof aside, there is a more fundamental problem with plaintiffs' approach to commonality, in that, even while seeking certification of a company-wide class, they concede that defendant's standardized, company-wide policies and procedures relating to discipline and promotion are (and were at all relevant times) non-discriminatory. Indeed, plaintiffs state that "If those procedures were followed, it might open the door to equal opportunity." Plaintiffs' Moving Brief, at 15. Their claim is that discrimination enters the picture only because defendant does not strictly adhere to its own policies governing discipline and promotion, but, rather, delegates broad authority for decision-making in promotions and discipline to its management personnel. This alleged policy of overdelegation is of no moment, however, in the absence of any proof that it opens the door to generalized discrimination. Here, as mentioned, neither plaintiffs' statistics nor its sociological opinion meaningfully supports such an inference. Indeed, as mentioned, the statistics, once analyzed in terms of individual

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3 Plaintiffs also submitted an unsworn, unsigned summary of the deposition testimony of another putative class member, Sharon Killiebrew. Defendants in turn submitted a statement from Ms. Killiebrew asserting that plaintiffs' summary was "taken out of context" and "slants, distorts and mischaracterizes my testimony." Rumeld Aff., Ex. 2.

positions, suggest only that, if there is any discrimination, it is localized to a few positions and individuals, insufficient to support a company-wide class. See Statsny, 628 F.2d at 279; see also Woodbury, 832 F.2d at 771; see also Bradford v. Sears, Roebuck and Co., 673 F.2d 792, 795-96 (5th Cir. 1982). And the sociological opinion simply assumes its conclusion, rather than meaningfully establishing it.

Accordingly, plaintiffs fail to establish commonality.

Plaintiffs have also failed to satisfy the typicality requirement of Rule 23(a)(3), i.e., the requirement that the claims or defenses of the representative parties be typical of the claims or defenses of the class as a whole. See Bishop v. New York City Dept. of Housing Preservation and Dev., 141 F.R.D. 229, 238 (S.D.N.Y. 1992). To the extent that plaintiffs allege that their claims are typical because they arise from alleged company-wide practices and course of conduct, this argument fails for the reasons set forth above. In addition, most of the named plaintiffs appear to center their individual allegations on claims that, on their face, depart markedly from the class allegations. For example, only five of the 25 plaintiffs assert a claim for discriminatory denial of promotion;[4] several plaintiffs admit that they have committed the infractions that gave rise to the challenged disciplinary incidents;[5] still others have been disciplined under plainly

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4 The plaintiffs who contend they have been denied promotions to positions are Veronica Caridad, Donald Hines, James Jackson, Cynthia King and Daryll Simpson. See Caridad Tr. 21-22; Hines Tr. 92-110; Jackson Tr. 110; King Tr. 114, 117; and Simpson Tr. 17-18.

5 For example, Joan Woodberry admitted to hitting a co-worker and being involved in fights with other employees, Woodberry Tr. 97, 109, 113, 147-51, and Anthony Ellis admits that he slept on the job and was

(continued...)

unique circumstances.[6] As previously mentioned, one of the plaintiffs is not even an African-American, and therefore, not at all a member of the class proposed by the notice of motion.[7] Moreover, the fact that not all named plaintiffs are union members may further preclude typicality. See Sheehan, 103 F.R.D. at 650-51; Lo Re v. Chase Manhattan Bank Corp., 431 F. Supp. 189, 197-98 (S.D.N.Y. 1977).

Accordingly, the typicality requirement is likewise not satisfied.

Based on the foregoing, plaintiffs' motion for class certification is denied.

SO ORDERED.

/s/
JED S. RAKOFF U.S.D.J.

Dated: New York, New York
August 8, 1997

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[5](...continued)
absent from his assigned location. Ellis Tr. 109, 111.

[6] For example, Charles Robinson contends that he was discriminated against in connection with his suspension for testing positive for drug use, Robinson Complaint, ¶¶37-72, and James Jackson's discipline arose from his alleged cover-up of safety violations. Jackson Tr. 89-90, 155-56.

[7] Geisele Miguel is a Pacific Asian Islander. Miguel Tr. 19-20.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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94 Civ. 7374 (JSR)

CHARLES ROBINSON, SHARON E. MACK, JAMES OLIVER, DARRYLL F. SIMPSON, VERONICA CARIDAD, DONALD HINES, JAMES JACKSON, LORD TAYLOR, EARL VAUGHN

Plaintiffs,

-v-

METRO-NORTH COMMUTER RAILROAD COMPANY,

Defendant.

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95 Civ. 8594 (JSR)

RAYMOND NORRIS, MARVIN EDWARDS, ERIC JONES, DANIEL CANADA, and GIESELE MIGUEL,

Plaintiffs,

-v-

METRO-NORTH COMMUTER RAILROAD COMPANY,

Defendant.

NOTICE OF APPEAL

NOTICE is hereby given that the plaintiffs in the above-named consolidated action, except Veronica Caridad, Tammy Jones, Earl Vaughn, Teresa Whyte, Dwayne Scott, Glenroy Liburd and Gisele Miguel, hereby appeal to the United States Court of Appeals for the Second Circuit from the memorandum order in this action denying plaintiffs' motion for class certification dated August 8, 1997 and entered on the 12th day of August, 1997 (copy attached as Exhibit A), the order of dismissal dated May 11, 1998 and entered on the 13th day of May, 1998 (copy attached as Exhibit B) and the final judgment entered in this action on the 15th day of May, 1998 (copy attached as Exhibit C).

Dated: June 11, 1998

Respectfully submitted,

/s/

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 Civ. 8594 (JSR)

RAYMOND NORRIS, MARVIN EDWARDS, ERIC JONES, DANIEL CANADA, and GIESELE MIGUEL, individually and on behalf of all others similarly situated

Plaintiffs,

-v-

METRO-NORTH COMMUTER RAILROAD COMPANY,

Defendant.

NOTICE OF APPEAL

NOTICE is hereby given that all the plaintiffs in the above-named action except Gisele Miguel hereby appeal to the United States Court of Appeals for the Second Circuit from the memorandum order in this action denying plaintiffs' motion for class certification dated August 8, 1997 and entered on the 12th day of August, 1997 (copy attached as Exhibit A), the order of dismissal dated May 11, 1998 and entered on the 13th day of May, 1998 (copy attached as Exhibit B) and the final judgment entered in this action on the 15th day of May, 1998 (copy attached as Exhibit C).

Dated: June 12, 1998

Respectfully submitted,

/s/

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FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the

fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class,

shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the actions; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998.)